

better appreciation of the considerations which the chairman had in mind in awarding compensation, foremost among which must have been the fact that appellant's father had built the premises about 1940, that the appellant had spent some considerable sum (though the chairman thought that his claim to having spent \$5,500 was exaggerated) in rebuilding or repairs, and that appellant's business on the premises was his only means of livelihood.

That being so, I would hold that there were indeed reasonable and adequate grounds for this condition, grounds both fair and just, not dependent on the mere caprice of the board, and would dismiss the cross-appeal by the landlord with costs.

I am equally satisfied that the terms of the order made by Dato Abdul Hamid J. dated 10th February 1969 in Civil Appeal No. 4 of 1968, (see page 1 in records of Civil Appeal No. 6 of 1972) did not in any way restrict the board to re-imposing the conditions it had originally imposed, should it decide to issue the certificate.

Accordingly, the appeal is also dismissed with costs.

Appeal dismissed.

Solicitors: *Athi Nahappan & Co.; Atma Singh Gill & Gill.*

YEOH TAT THONG v. GOVERNMENT OF MALAYSIA & ANOR.

[O.C.J. (Chang Min Tat J.) July 5, 1974]
[Penang — Civil Suit No. 224 of 1973]

Land Law — Lands in Penang held under indentures by the East India Company — Replacement title issued — Whether lands are land alienated before the commencement of the code — Whether subsidiary legislation made under the National Land Code ultra vires or null and void — National Land Code (Penang and Malacca Titles) Act, 1963 — National Land Code, 1965, s. 439.

In this case the plaintiff asked for declarations (a) that his lands were not alienated lands within the meaning of either section 101 and 102 of National Land Code; (b) that paragraph 2(a) of the Second Schedule of L.N. 478 and the notification in P.U. (A) 526 were *ultra vires* section 439 of the National Land Code; and (c) that Penang P.U. 4 of 1970 and P.U. 39 of 1969 were null and void of no operative effect. The plaintiff's lands were originally held under indentures by the East India Company and replacement titles had been issued in respect thereof.

Held: (1) the lands comprised in the indentures were lands alienated before the commencement of the Code within the ambit of section 102 of the National Land Code, 1965;

(2) the court was bound by the decision of the Federal Court in Special Cases No. 1 and 2 of 1974 to hold that paragraph 2(a) of the Second Schedule of L.N. 478 and the Notification in P.U. (A) 526 were not *ultra vires* section 439 of the National Land Code and that Penang P.U. 4 of 1970 and P.U. 39 of 1969 were not null and void.

Cases referred to:-

- (1) *Oriental Holdings v. Government of the State of Penang and Government of Malaysia* [1972] 2 M.L.J. 248.
- (2) *Philip Hoalim Jr. & Anor. v. State Commissioner, Penang* [1974] 2 M.L.J. 100.
- (3) *Lau Gek Swee & Co. Sdn. Bhd. v. State Commissioner, Penang* [1974] 2 M.L.J. 103.

A CIVIL SUIT.

Lim Kean Chye for the plaintiff.

Abdullah Ngah (Senior Federal Council) for the first defendant.

Abu Talib bin Othman, Legal Adviser, Penang for the second defendant.

B

Chang Min Tat J.: In this action, the plaintiff sought various declaratory orders to rule out effectively the provisions for enhanced quit rents from his lands. He asked first for a declaration that his lands were not alienated lands within the meaning of either section 101 and section 102 of the National Land Code, secondly that paragraph 2(a) of the second schedule of L.N.478 and the notification in P.U.(A)526 were *ultra vires* section 439 of the National Land Code and that Penang P.U.4 of 1970 and P.U.39 of 1969 were null and void and of no operative effect.

C

Briefly, by paragraph 2(a) of the second schedule of L.N.478, "land held under interim title or final replacement title shall be deemed to be land alienated before the commencement of the Code and references to alienated land shall be construed accordingly." The order under P.U.(A)526 by the deletion of paragraph 9 of L.N.478 brought lands in Grants (first-grade) under the National Land Code (Penang and Malacca Titles) Act 1963 or final replacement title issued in respect of such grants back within this definition. Penang P.U.39 of 1969 was a Direction for Standard Rate Rent and Penang P.U.4 of 1970 was a Notice of Periodic Revision of Rent.

D

E

The defendants were the Government of the Federation of Malaysia and the Director of Lands and Mines Penang. The Government was concerned in respect of L.N.478 and P.U.(A)526. The Director of Lands was brought in over P.U.39 of 1969 and P.U.4 of 1970.

F

The subsidiary legislations have been dealt with extensively by me in *Oriental Holdings v. Government of the State of Penang and Government of Malaysia*⁽¹⁾ and I do not propose to repeat them here. The fact of the case itself is not strictly in point. There I dealt with a piece of land that was effectively granted by the State Authority under the State Land Ordinance (S.S. Laws Cap. 113). That piece of land was, in the interpretation by the Federal Court in Special Case No. 1 of 1973, "alienated land" within the definition in section 5 of the National Land Code.

G

H

Here I am concerned with 4 pieces of land which could be traced back through an unbroken line of transactions to grants made under indentures by the East India Company.

I

These indentures have been set out in the Agreed Bundle of Documents. Briefly, the first was Indenture No. 70 of 1852/53, for old Lots Nos. 11 and 12 in Mukim 16, North East District of Penang. The second was Indenture No. 210 of 1852/53 for old Lots Nos. 22 and 23(1) in the same mukim and district. The dates of these indentures were 2 September 1852 and 11 April 1853 respectively.

Now indentures were considered by the Federal Court in Special Case No. 1 of 1973⁽²⁾ which was referred to it under the provisions of section 48(2)

of the Courts of Judicature Act 1964. The reference was made in the form of four questions. They are, as follows:

1. Whether as successor of Her Majesty's Government in respect of the Settlement of Penang, the Government of the State of Penang is bound by reason of Article 167(2)(a) of the Constitution towards its subject in regard to rights, liabilities and obligations which formally bound Her Majesty's Government towards them;
2. Whether the legislations, namely L.N.478/65, P.U.(A)526/69, Pg.P.U.39/69 and Pg.P.U.4/70 are not only contrary to the said Article 167(2)(a) but are also tantamount to deprivation of property under Article 13(1);
3. Whether the said land is "alienated land" for the purpose of the National Land Code; and
4. Whether it is within the competency of the State Authority for the State of Penang to enact laws, namely Pg.P.U.39/69 and Pg.P.U.4/70 affecting the rights previously enjoyed by its subjects and for the purpose of this motion, whether those rights are to be deemed 'vested rights'.

On 10 June 1974, the Federal Court answered these questions in the following manner:

Question 1: the answer is No.

" 2: " " " No.

" 3: " " " No.

" 4: " " " Yes.

I pause to note that in another reference, Special Case No. 2 of 1973,⁽³⁾ the subject matter was a Statutory Land Grant made in 1955. It was not granted by the State Authority referred to in the definition of "alienated land" in section 5 of the National Land Code and defined in the case of Penang, as the Governor of the State.

By the principle of *stare decisis* to which our courts subscribe, I am as a matter of course bound by any decision of the Federal Court. It must mean that the High Court in Penang must deal with this case in the light of the answers returned by the Federal Court, as it was enjoined to do by the Federal Court in its judgments in the cases of Originating Motions 9 and 11 of 1970. Mr. Lim Kean Chye for the plaintiff however urged on me certain considerations which he said were new and in the light of these considerations, to consider that perhaps the decision of the Federal Court was arrived at *per incuriam* or *obiter* and consequently was not binding. Encik Abu Talib, Legal Adviser Penang for the Director of Lands and Mines, Penang confessed to certain difficulties in future land dealings under the National Land Code in the light of the ruling of the Federal Court that the lands originally held under indenture or under statutory land grants made prior to Merdeka Day by the British Government were not alienated lands. Since all dealings by transfer under section 214, by leases under section 221, section 223 and section 228, and by charges under section 241 are in the National Land Code made with reference only to alienated lands and not to lands alienated before the commencement of the Code, it

A could mean that there could be no such dealings for lands held under indentures or under statutory land grants made before Merdeka Day.

I had no means of knowing exactly what arguments were advanced in the Federal Court except from what appeared in the judgment itself, but in deference to counsel before me and without intending any disrespect whatsoever, I entertained the arguments of counsel before me and I now proceed to consider them.

The nub of Mr. Lim's contention was that the definitions of "alienate" and "alienated land" in the National Land Code referred to grants made under "a previous land law" and since the indentures were not executed under any land law, his client's lands could not be caught by the operation of any orders affecting any alienated land. And of course he found additional support in the answer of the Federal Court to the third question.

Mr. Lim's contention involved a historical survey of Penang and the system of making grants of land in the island.

The first occupation of Penang Island occurred in 1786 when Captain Francis Light proclaimed that he had taken possession of the island in the name of King George III for the use of the East India Company. His occupation was in 1791 formally recognised by the Raja of Kedah by a treaty entered into between Captain Francis Light as Governor of Penang and representative of the East India Company and the Raja of Kedah. It was to last "as long as the sun and moon give light," subject to an annual payment. When in 1802, the territory on the mainland known as Province Wellesley was ceded, the annual payment was increased to \$10,000/-. From the occupation, Penang together with Malacca and Singapore were administered as the Straits Settlements by the East India Company, until 1867, when the territories were taken over by the British Crown. There would appear to be some differences in opinion whether in the light of the claim of Captain Francis Light that he found the island uninhabited the occupation was a cession or a settlement. But whatever the implications of this distinction might be, there does not appear to me to be any doubt whatsoever that suzerainty of the island passed from the occupation to the British Crown. The *de facto* occupation became *de jure* with the signing of the treaty and since then in the comity of nations and particularly in the relationship between the metropolitan Government and Penang on the one hand and the world in general and Kedah and the other Malay States in particular on the other, this had been a fact agreed to and recognised by all. And it was on this basis that Penang became a part of the Federation of Malaya.

Further whatever the position in the matter of grants of land in Penang was before 1840 and whether Captain Francis had or had not the powers to make such grants, after 1839, the matter became clarified in the Straits Land Act, which was Indian Act XVI of 1839: see *Braddell's Law of the Straits Settlements* Vol. 1 (printed in 1931) at page 45 et seq. This Act was passed under the provisions of the Government of India Act 1833, whereby the Governor General in Council in India was empowered to legislate for the

territories of the East India Company which included, *inter alia*, the Prince of Wales Island or Penang. By this Act, *inter alia*, the procedure of the land office with regard to the issue of titles was laid down. Under section 5, the Collector of Land Revenue was empowered to make grants for clearing and occupying waste and forest lands for the purposes of agriculture for a term not exceeding 20 years renewable for a further period of 30 years on terms to be determined by the Governor of Bengal. Any applications for a greater period was under section 7 to be granted or rejected by the Governor of Bengal. In view of the terms of sections 5 and 7, I do not think it would be quite correct to regard this act as procedural and not substantive.

There existed at this time a pertinent regulation. Regulation 1 of 1831 was for enforcing the taking out of regular grants for lands hitherto occupied without such documents. It was passed by the Vice-President in Council on 21 June 1831 and approved by the Court of Directors and by the Board of Commissioners for the affairs of India. It provided *inter alia* that no title except a regular grant was to be held as a valid instrument and for the change of previous documentary proofs such as cutting papers and measurement papers into regular grants and for their registration.

The preamble is of some interest. It is in these words:

"Whereas it is well-known that on the first occupation of this Island, the actual Sovereignty as well as the Proprietary right over all the Lands therein became vested in the British Government, and consequently that no Title Deeds or Instrument purporting to convey to any person Property in the land can be valid, save and except such as emanate and descend from the Public Officer, exercising, under due authority, the Superintendence, Administration or Government of this Island..."

Next in point of time, an act known as Act No. IX of 1842 was passed by the President of the Council of India in Council, with the assent of the Governor-General of India for extending the English Act, 4 and 5 Vict. Ch. XXI in certain cases to the Territories of the East India Company. This was an Act for rendering a Release as effectual for the Conveyance of Freehold Estates as a Lease and Release by the same parties. Section 1 was in these words:

"Whereas it is expedient to lessen the expense of conveying freehold estates: be it enacted by the Queen's most Excellency Majesty, by and with the advice and consent of the Lords Spiritual and Temporal and Commons, in this present Parliament assembled, and by the authority of the same, that every deed or instrument of release of a freehold estate, or deed or instrument purporting or intending to be a deed or instrument of release of a freehold estate, which shall be executed on or after the 15th day of May 1841, (and shall be expressed to be made in pursuance of this Act) shall be as effectual for the purposes therein expressed, and shall take effect as a conveyance to uses or otherwise, and shall operate in all respects both at law and equity, as if the releasing party or parties who shall have executed the same had also executed in due form a deed or instrument of bargain and release, although no such deed or instrument of bargain and sale, or lease, for a year, shall be executed, provided that every such deed or instrument so taking effect under this Act shall be chargeable with the same amount of stamp duty as any bargain and sale, or lease, for a year, would have been chargeable with (except progressive duty) if executed to give effect to such deed or instrument, in addition to the stamp duties which such deed or instrument shall be chargeable with, as a release or otherwise, under any Act or Acts relating to stamp duties."

A It was against this background that the two indentures in question were executed. They were in identical terms, save as to the names of the purchasers and the specifications of the lands. They were in these terms:

B "This Indenture made the _____ day of _____ in the year of Christ One Thousand Eight Hundred and _____ Between the East India Company on behalf of Her Majesty Victoria Queen of the United Kingdom of Great Britain and Ireland, her Heirs and Successors, of the first part and _____ (the purchasers) of the second part.

C WITNESSETH that the said East India Company for and in consideration of the sum of _____ paid to them _____ and also in consideration of the covenants, provisos and conditions hereinafter expressed, do in pursuance of Act IX of 1842, in virtue of all and every right, title, interest, powers and authority whatsoever now vested in the said East India Company, grant, bargain, sell and release unto the said _____ (the purchasers) All that piece of land _____

TO HAVE and TO HOLD the same _____ subject nevertheless to the proviso and condition hereinafter contained."

D The condition was a provision for clearing and cultivating the land at a specified rate and within a certain period, upon penalty of forfeiture. The indentures were executed by the Chief Executive Officer in charge of Prince of Wales Island by the authority of the Governor General of India in Council.

E One of the criticisms made by Mr. Lim was directed to Regulation No. 1 of 1831. For this, he relied on the examination conducted by Sir Benjamin Malkin, Recorder (reproduced in pp. 295-296 of the University of Malaya Law Review 1971) and his conclusion that it was passed in excess of the powers granted under the Statute 13 Geo.III, c.63, s.36. However valid this criticism might be, it does not seem to me, with respect, relevant. It is clear that the indentures in question were made out not under Regulation No. 1 of 1831 but under the provisions of Act IX of 1842 as extended, *inter alia*, to Penang.

F The indentures were thus in the terms of section 1 of the English Act deeds of bargain and sale by the Queen to the purchasers.

G Any criticism that the indentures were not alienations under any land law could in the circumstances of the land history of Penang only be made if by law is meant an act of Parliament or local legislature passed in due form. I do not, with respect, accept this limited interpretation of the law. Not only is the word capable of a larger and more extended meaning but except where required by a sound rule of interpretation or by the context, such a meaning should in general be given to it. The definition of "law" in section 2(1)(43C) of the Interpretation and General Clauses Ordinance No. 7 of 1948 reads as follows:

H "Law" includes written law, the common law in so far as it is in operation in the Federation or any part thereof and any custom or usage having the force of law in the Federation or any part thereof."

I Further, the British Empire was in its day built up on and ruled by proclamations and orders in council, which constituted the laws of the land, until replaced by local legislation.

It will be seen therefore that even a historical survey lends support for the view taken by the Federal Court that the lands comprised in the indentures were lands alienated before the commencement of the Code within the ambit of section 102 of the Code.

Apart from this one point which possibly was not canvassed in Special Case No. 1 of 1973, all other arguments of Mr. Lim were considered and answered by the Federal Court. He however contended that I should not regard this decision as binding. It was in the first place *obiter*, because the reference should not have been made at all, as even the Federal Court acknowledged. But the parties submitted to the determination and the Federal Court which has original jurisdiction in such a reference, accepted the task. With respect therefore I cannot presume to regard the decision as *obiter*. Nor can I regard it a *per incuriam*. Moreover the decision appears to approve, in the result, the reasons given by me in my judgment in the *Oriental Holdings*' case.

As for the conveyancing difficulty seen by Encik Abu Talib in the answer to the third question, the consideration whether this question arose necessarily for the determination of the Federal Court in the issue before it in Special Case No. 1 of 1973, which was whether the subsidiary legislations were validly made and applicable to the applicants' land held under an indenture is for the same reasons not for me to ponder. Nor fortunately is the question whether the answer lies in legislative amendment or in any effective means whereby the Federal Court can depart from its own decision.

For the reasons given above and following the decision of the Federal Court, the action is dismissed with costs.

Action dismissed.

Solicitors: *Lim Kean Chye & Co.*

PUBLIC PROSECUTOR v. TEOH HOCK HAI

[R.Cr.J. (Chang Min Tat J.) July 12, 1974]

[Penang — Criminal Revision No. 8 of 1974]

Criminal Law and Procedure — Employee driver charged with offences in connection with driving of a vehicle which was not licensed and not insured — Whether responsibility of employee — Road Traffic Ordinance.

In this case the respondent who was employed as a driver had been convicted of various offences in connection with the driving of a motor vehicle which was not licensed and not insured.

Held: as the driver employee was not responsible for the licensing or insuring of the vehicle it is undesirable to charge him and in this case the convictions should be set aside and the fines refunded and the respondent admonished and discharged.

Cases referred to:-

- (1) *Yap Yoke Sam v. Public Prosecutor* [1955] M.L.J. 114.
- (2) *Public Prosecutor v. Chuan Keat Chan Ltd.* [1973] 1 M.L.J.

A CRIMINAL REVISION.

T. Selventhiranathan (Deputy Public Prosecutor) for the applicant.

Goh Lim Eam for the respondent.

Chang Min Tat J. (delivering oral judgment): This case was brought to my notice by an anonymous letter. The purpose of the letter was not to seek from me the order that I now propose to make. It was obviously written for a sinister motive by somebody who had obviously a very sick mind.

This is a case where a driver, an employee, was charged with various offences in connection with the driving of a vehicle which was not licensed and not insured. The notice of the magistrate was not drawn to the case of *Yap Yoke Sam v. Public Prosecutor*⁽¹⁾ where the facts are on all fours. It is only necessary for me to read the judgment of Buhagiar J. in that case to explain why I now propose to make the order that I shall be doing shortly.

I herein quote:

"The learned counsel for the appellant conceded that technically the appellant has committed the offences in question but submitted that he should not have been charged with these offences; he submitted that the appellant is only an employee and as such he is not responsible for obtaining a haulage permit or for seeing that a third party risk insurance policy is in force for the use of the vehicle for commercial purposes; furthermore as the person whose duty it was to see to such things was charged, the charges against the appellant amounted to a multiplicity of charges. The learned counsel referred me to the case of *Carpenter v. Campbell & Ors.* where Lord Goddard held that although it is technically correct for a summons to be issued against the driver of the unlicensed vehicle, this course tends to be oppressive and is undesirable where the driver is the employee of the owner and not responsible for the licensing of the vehicle. In that case the case was sent back to the justices to convict the company (the owner of the unlicensed vehicle) and the justices were directed to give an absolute discharge to the driver. Lord Goddard added: 'and I hope that persons who are responsible for these prosecutions will not in similar cases multiply summonses in this way, but will serve the people responsible and not the people who are not responsible'."

I follow Buhagiar J. in agreeing with Lord Goddard.

Mr. Goh Lim Eam for the respondent drew my attention to this passage from the judgment of the Federal Court in *Public Prosecutor v. Chuan Keat Chan Ltd.*⁽²⁾ at page 250:

"We should, however, like to add a rider; we do not think it right or proper or that it serves any purpose for the driver carrying out or disobeying the instructions of his employer also to be prosecuted. The principle to be applied is respondeat superior and it is true to say that invariably the employer has been paying his driver's fine. The only possible exception would be where the driver takes out a vehicle for his own private gain, using it without the owner's knowledge, consent or connivance; in which case, the proper person to be prosecuted should be the driver himself and no reflection cast on the owner if by evidence produced, he can exonerate himself."

I have ascertained that the employers have been adequately dealt with and for the same reasons I now set aside the convictions and order that the fines if paid be refunded and admonish and discharge the respondent under section 183(2)(a) of the Criminal Procedure Code.

Conviction set aside.

Solicitors: *Lee Kok Liang & Co.*